

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STEVEN MADISON	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 06-CV-1360
SUPERINTENDENT PIAZZA, et al.	:	

MEMORANDUM & ORDER

Kauffman, J.

March 19, 2007

Now before the Court is the Petition of Steven Madison (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated in State Correctional Institution at Coal Township, Pennsylvania. For the reasons that follow, the Petition will be denied.

I. PROCEDURAL HISTORY

On June 24, 1994, a jury sitting in the Court of Common Pleas of Philadelphia County convicted Petitioner of robbery, criminal conspiracy, carrying a firearm on a public street, and aggravated assault.¹ Petitioner was sentenced to an aggregate term of 37 ½ to 75 years imprisonment. His direct appeal was dismissed on February 22, 1996 as a result of his counsel’s failure to file an appellate brief. See Commonwealth v. Madison, 1347 Phila. 1995 (Pa. Super. Feb. 22, 1996). On or about June 20, 1996, Petitioner retained new counsel to file a PCRA petition on his behalf. See Exhibit C to Petitioner’s Objections. Retained counsel failed to do so. Approximately four years later, on July 27, 2000, Petitioner, acting pro se, filed a motion in

¹ The jury found Petitioner guilty of shooting and seriously injuring a Philadelphia police officer and battering a store employee in the course of a violent armed robbery of a check-cashing store. See Commonwealth v. Madison, No. 9401-0083, Slip. Op. (Ct. Com. Pl. Phila. County Nov. 15, 1995).

the Superior Court seeking reinstatement of his appellate rights nunc pro tunc. The motion was denied on August 31, 2000. See Commonwealth v. Madison, 75 EDM 2000 (Pa. Super. Aug. 31, 2000).²

On December 18, 2000, Petitioner filed a pro se petition for state collateral review pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa. C.S.A. § 9541 et seq. The PCRA Court appointed counsel, who filed an amended PCRA petition. On September 25, 2002, after concluding that the PCRA petition was untimely, the PCRA court denied the petition and the Superior Court affirmed. See Commonwealth v. Madison, 3266 EDA 2002 (Pa. Super. March 16, 2004). The Pennsylvania Supreme Court declined review on November 2, 2005. See Commonwealth v. Madison, 887 A.2d 1240 (Pa. 2005) (Table).

On March 27, 2006, Petitioner filed the instant pro se habeas petition, alleging (1) ineffective assistance of trial, appellate, and PCRA counsel; (2) errors on the part of the trial court in the application of federal law; and (3) error on the part of the PCRA court in dismissing his PCRA petition.³ The Court designated United States Magistrate Judge Arnold C. Rapoport to submit a Report and Recommendation (“R&R”). See 28 U.S.C. § 636(b)(1)(B); Local R. Civ. P. 72.1(I)(b). Having found that the Petition was untimely and that Petitioner was not entitled to the remedy of equitable tolling, Magistrate Judge Rapoport recommended that the Petition be dismissed. Petitioner has filed objections to Magistrate Judge Rapoport’s R&R, which requires

² The Superior Court denied Petitioner’s motion to reinstate his appellate rights “without prejudice to the Petitioner’s right to apply to the lower court for the requested relief via the Post Conviction Relief Act...” See Exhibit P to Petitioner’s Objections.

³ Petitioner argues that he was deprived of his Sixth Amendment right to effective assistance of counsel at various phases of his defense. He does not make a claim of actual innocence.

the Court to “make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(c).

II. LEGAL STANDARD

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2244 et seq., which provides in pertinent part:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest of -

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review ...

28 U.S.C. § 2244(d)(1). The statute is tolled during the time in which “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

The statute of limitations is subject to equitable tolling when the “principles of equity would make [the] rigid application [of a limitation period] unfair.” Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998) (internal quotations omitted). “This unfairness generally occurs when the petitioner has in some extraordinary way ... been prevented from asserting his or her rights.” Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (internal quotations omitted). The petitioner “must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.” Id. at 618-19 (internal quotations omitted).

III. ANALYSIS

In accordance with 28 U.S.C. § 2244, Petitioner’s conviction became final on March 25,

1996, upon expiration of the 30-day period for seeking direct review of the dismissal of his appeal. The AEDPA's one-year statute of limitation for filing a federal habeas petition began to run on April 24, 1996, the date the AEDPA became effective.

Absent any tolling, Petitioner would have had until April 24, 1997 to file his habeas petition. However, the instant petition was not filed until March 27, 2006 – almost nine years later. The statute of limitations under AEDPA is subject to equitable tolling, but “only when the principle of equity would make the rigid application of a limitation period unfair.” Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). The burden of showing a basis for equitable tolling is a heavy one. Mazzie v. Bowen, 1988 WL 92202, at *2 (E.D. Pa. Sep. 1, 1988) (citing Heckler v. Day, 467 U.S. 104, 106 (1984)). A habeas petitioner seeking equitable tolling of the limitations period must show that he has been pursuing his rights diligently, and that some extraordinary circumstance stood in his way. See Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); LaCava v. Kyler, 398 F.3d 271, 277 (3d Cir. 2005) (“It is a well-established principle that, in order for appellant to claim an entitlement to equitable tolling, he must show that he exercised reasonable diligence in bringing the claims”) (citations omitted); Schlueter v. Varner, 384 F.3d 69, 78 (3d Cir. 2004).

Accepting his allegations as true, Petitioner has been treated in an extraordinarily unacceptable way by two of his attorneys. His failure to assert his claim of ineffective assistance of counsel in a diligent way is, however, indisputable. On or about June 20, 1996, approximately four months after his direct appeal had been denied because his counsel failed to file an appellate brief, Petitioner retained new counsel to file a PCRA petition on his behalf. See Exhibit C to Petitioner's Objections. Petitioner claims that “after retaining counsel and paying the full

amount requested by counsel ... for three years, [counsel] failed to file said PCRA Petition on Petitioner's behalf and effectively abandoned Petitioner without ever notifying [him] that said Petition was never filed." See Petitioner's Memorandum in Support of Petition, at 3-4 (emphasis added). Assuming the truth of Petitioner's allegations, the alleged conduct would clearly constitute ineffective assistance of counsel. However, Plaintiff's plea for equitable tolling fails because he has not shown that he exercised reasonable diligence in pursuing his claims.⁴ See Pace v. DiGuglielmo, 544 U.S. 408, 419 (2005); Satterfield v. Johnson, 434 F.3d 185, 196 (3d Cir. 2006); Stanley v. McKune, 133 Fed. Appx. 479, 480 (10th Cir. 2005) ("[a habeas petitioner] must be diligent in filing his own claims, and misplaced reliance on an attorney does not explain why [he] did not file his first postconviction pleading until six years after his conviction."). On January 20, 1999, approximately 2 ½ years after new counsel had allegedly been retained (see Exhibit C to Petitioner's Objections), Petitioner wrote to him to inquire whether the PCRA petition had been filed, and if not, to request reasons for the undue delay. See Exhibit H to Petitioner's Objections. Despite his expressed concern that his attorney had not yet filed the petition, Petitioner waited almost two more years – until December 18, 2000 – to file a pro se PCRA petition. Petitioner's amended PCRA petition was denied as untimely on September 25, 2002. Despite the egregiousness of counsels' conduct, such unexplained delay precludes a finding of diligence on the part of the Petitioner.

⁴ A reasonably-diligent claimant would not permit three years to elapse before learning that a PCRA petition had not been filed on his behalf.

IV. CONCLUSION

Since the applicable limitations period expired in April 1997, the instant habeas petition was filed almost nine years late. In the absence of a showing of diligence that would meet the rigorous standard for equitable tolling, the petition will be dismissed as time-barred. Because Petitioner has not made the requisite showing of the denial of a constitutional right, a certificate of appealability should not issue. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). An appropriate Order follows.

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ORDER

AND NOW, this 19th day of March, 2007, upon consideration of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport (docket no. 10) and Petitioner's Objection thereto (docket no. 14), and after de novo review of the pleadings and record in this case, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is **DENIED** and **DISMISSED**;
3. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.